Supreme Court U.S.
FILED
JAN 22 2003
OFFICE OF THE CLERK

(2)

No. 02-1003

In the Supreme Court of the United States

EAST FORD, INC.,

Petitioner,

v.

JAMES E. TAYLOR, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM LISTON, III
Counsel of Record
LISTON/LANCASTER
304 N. CONGRESS STREET
P.O. BOX 22983
JACKSON, MS 39225
(601) 944-0820

E. BARRY BRIDGFORTH
HENRY, BARBOUR
& DECELL, PLLC
117 E. JEFFERSON STREET
P.O. BOX 1569
YAZOO CITY, MS 39194
(662) 746-2134

Counsel for Respondent James E. Taylor, Jr.

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

32 pp

QUESTION PRESENTED

Whether the Mississippi Supreme Court violated Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) by invalidating an arbitration agreement due to unconscionability, a ground which exists at law or equity for the revocation of any contract.

PARTIES TO THE PROCEEDING

Respondent

Respondent, Mr. James E. Taylor, Jr., is an individual citizen of the United States, residing in Leflore County, Mississippi. Mr. Taylor filed suit in the Circuit Court of Hinds County (First Judicial District), Mississippi against Petitioner, East Ford, Inc., a corporation domiciled within Hinds County, Mississippi. Mr. Taylor was Appellee in the Supreme Court of Mississippi.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Reasons for Denying the Petition 1

I. The Mississippi Supreme Court Did Not Violate the Federal Arbitration Act in Deciding *East Ford* 1

II. Inconspicuous Print Was Not the Only Reason for the Holding in *East Ford* . . . 4

III. The Mississippi Supreme Court Is Not Biased Against Arbitration 9

IV. There Are No Compelling Reasons for Grant of the Petition 12

Conclusion 14

Appendix 1a

Appendix A
Affidavit of James E. Taylor, Jr 1a

Appendix B
Affidavit of Bryan Childress 6a

Appendix C
Bill of Sale dated May 10, 1999 . . . . . 9a

TABLE OF AUTHORITIES

FEDERAL CASES:

Aetna Finance Company v. Williams,
526 U.S. 1051, 119 S.Ct. 1357,
143 L.Ed.2d 518 (1999) 13

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265, 115 S.Ct. 834,
130 L.Ed.2d 807 (1995) 1-2

Bank of Indiana, Nat'l Ass'n v. Holyfield,
476 F.Supp. 104 (S.D. Miss. 1979) 3

Choice Hotels International, Inc. v. Ticknor,
534 U.S. 1133, 122 S.Ct. 1075,
151 L.Ed.2d 977 (2002) 12

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681, 116 S.Ct. 1652,
134 L.Ed.2d 902 (1996) 1

Helvering v. Gowran,
302 U.S. 238, 58 S.Ct. 154,
82 L.Ed. 224 (1937) 9

Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.,
293 U.S. 268, 55 S.Ct. 182,
79 L.Ed. 356 (1934) 9

Perry v. Thomas,
482 U.S. 483, 107 S.Ct. 2520,
96 L.Ed.2d 426 (1987) 1

Ticknor v. Choice Hotels International, Inc.,
265 F.3d 931 (9th Cir. 2001) 12

Walton v. Rose Mobile Homes, LLC,
298 F.3d 470 (5th Cir. 2002) 10

York v. Georgia-Pac. Corp.,
585 F.Supp. 1265 (N.D. Miss. 1984) 3, 4

STATE CASES:

City of Starkville v. 4-County Electric Power Association,
819 So.2d 1216 (Miss. 2002) 10

D'Angelo v. Hometown Concepts, Inc.,
791 So.2d 270 (Miss. Ct. App. 2001) 10

East Ford, Inc. v. James E. Taylor, Jr.,
826 So.2d 709 (Miss. 2002) 1, 2, 3, 5, 7

Entergy Miss., Inc. v. Burdette Gin Co.,
726 So.2d 1202 (Miss. 1998) 3

Flores v. Transamerica Homefirst, Inc.,
113 Cal. Rptr. 2d 376 (Cal. Ct. App. 2001) . . . 12

In re Will of Johnson,
351 So.2d 1339 (Miss. 1977) 3

IP Timberlands Operating Company, Ltd. v. Denmiss Corporation,
726 So.2d 96 (Miss. 1998) 10

Iuka Guar. Bank v. Beard,
658 So.2d 1367 (Miss. 1995) 11

Iwen v. U.S. West,
977 P.2d 989 (Mont. 1999) 12

Mauck v. Columbus Hotel Co.,
741 So.2d 259 (Miss. 1999) 6

Merchant's Nat. Bank v. Stewart,
608 So.2d 1120 (Miss. 1992) 11

Newton County Bank v. Jones,
299 So.2d 215 (Miss. 1974) 11

Parkerson v. Smith,
817 So.2d 529 (Miss. 2002) 9, 10

Powertel, Inc. v. Bexley,
743 So.2d 570 (Fla. Ct. App. 1999) 12

Russell v. Performance Toyota, Inc.,
826 So.2d 719 (Miss. 2002) 8, 10, 11

Showmethemoney Check Cashers, Inc. v. Williams,
27 S.W.3d 361 (Ark 2000) 13

Smith Barney, Inc. v. Henry,
775 So.2d 722 (Miss. 2001) 10

Tel-Com Management, Inc. v. Waveland Resort Inns, Inc.,
782 So.2d 149 (Miss. 2001) 11

Terre Haute Cooperage v. Branscome,
203 Miss. 493, 35 So.2d 537 (1948) 3

Trapp for use and benefit of First Mississippi Bank of Commerce v. Tidwell,
418 So.2d 786 (Miss. 1982) 11

Williams v. Aetna Finance Company,
700 N.E.2d 859 (Ohio 1998) 12

STATUTES:

9 U.S.C. §2 . . . . . i, 1

OTHER AUTHORITIES:

U.S. Sup. Ct. R. 10 12

REASONS FOR DENYING THE PETITION

I. THE MISSISSIPPI SUPREME COURT DID NOT VIOLATE THE FEDERAL ARBITRATION ACT IN DECIDING *EAST FORD*

Section 2 of the Federal Arbitration Act (hereinafter "FAA") declares that written agreements to arbitrate shall be valid, irrevocable, and enforceable "save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. §2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683, 116 S.Ct. 1652, 1654, 134 L.Ed.2d 902 (1996) held that a Montana statute which placed limitations exclusively upon arbitration agreements conflicted with the FAA and was preempted by federal law.

No legislative enactment pertaining to arbitration is at issue in *East Ford, Inc. v. James E. Taylor, Jr.*, 826 So.2d 709 (Miss. 2002). *East Ford* involves application by the Mississippi Supreme Court of the common law defense of procedural unconscionability, a ground for revocation of any contract under Mississippi law.

The constraints upon invalidating arbitration agreements subject to the FAA are clearly established. Arbitration agreements may only be invalidated under state law which arose to govern issues concerning the validity, revocability and enforceability of contracts generally; a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with Section 2 of the FAA. *Perry v. Thomas*, 482 U.S. 483, 492, n. 9, 107 S.Ct. 2520, 2527, n. 9, 96 L.Ed.2d 426 (1987). States may regulate contracts, including arbitration clauses, under general contract law principles. *Allied-Bruce Terminix*

Cos. v. Dobson, 513 U.S. 265, 281, 115 S.Ct. 834, 843, 130 L.Ed.2d 807 (1995).

Doctor's Associates reiterated these precepts in the context of a Montana statute which specifically targeted arbitration agreements. Recognizing that the FAA precludes States from singling out arbitration provisions for suspect status, this Court declared that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Doctor's Associates*, 517 U.S. at 687, 116 S.Ct. at 1656. However, state law may be applied to invalidate an arbitration agreement if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. *Id.* Thus, a court may invalidate an arbitration agreement under generally applicable contract defenses such as fraud, duress or unconscionability without contravening Section 2 of the FAA. *Id.*

The Mississippi Supreme Court heeded federal dictates in *East Ford*. Citing *Doctor's Associates*, the following pronouncement precedes the court's opinion:

> This Court writes to express to the bench and bar that we adhere to federal policy favoring arbitration and that arbitration agreements are not per se inherently unconscionable.
>
> However, where as here, an arbitration agreement is found to be unconscionable pursuant to general state law principles, then it may be invalidated without offending the Federal Arbitration Act. *East Ford*, 826 So.2d at 711.

Obviously, the Supreme Court of Mississippi understood it was prohibited from invalidating arbitration agreements under state laws applicable only to arbitration provisions. See, *East Ford*, 826 So.2d at 714.

The doctrine of unconscionability - both procedural and substantive - exists under Mississippi common law. Unconscionability arose as a defense under Mississippi law to govern the enforceability of contracts generally. Its genesis was not related to arbitration. See, *York v. Georgia-Pac. Corp.*, 585 F.Supp. 1265 (N.D. Miss. 1984); *Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F.Supp. 104 (S.D. Miss. 1979); *In re Will of Johnson*, 351 So.2d 1339 (Miss. 1977); *Terre Haute Cooperage v. Branscome*, 203 Miss. 493, 35 So.2d 537 (1948).

The holding in *East Ford* is limited to its facts and does not offend the Federal Arbitration Act. The Mississippi Supreme Court invalidated the subject arbitration agreement on the ground of procedural unconscionability, a state law generally applicable to all contracts. *East Ford*, 826 So.2d at 717. Despite claims by East Ford to the contrary, the Mississippi Supreme Court has not exclusively applied the law of unconscionability to just arbitration agreements.

Although the Mississippi Supreme Court's opportunities to consider procedural unconscionability have been rare, it has invalidated other unconscionable contractual provisions. In *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998), a case which did not involve arbitration, the Mississippi Supreme Court held that an indemnity clause in an electrical utility service agreement was procedurally unconscionable. *Entergy*, 726 So.2d at 1207-1208. The court applied in *Entergy* the same elements of procedurally unconscionability which are cited in *East Ford*.

Consequently, the law under which the court decided *East Ford* was not fashioned for exclusive application to arbitration agreements but for application to all contracts generally.

Mississippi countenances no law, statutory or common, which singles out and targets arbitration provisions. Mississippi law does, however, afford relief to those who prove that any contract, including an arbitration agreement, is unconscionable. As demonstrated herein, one cannot reasonably argue that *East Ford* places arbitration agreements on unequal footing with other contracts under Mississippi law.

II. INCONSPICUOUS PRINT WAS NOT THE ONLY REASON FOR THE HOLDING IN *EAST FORD*

Procedural unconscionability may be found where the Plaintiff shows a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms. *York*, 585 F.Supp. at 1278. Unconscionability is an exception to the usual rule that the terms of a contract are not to be questioned. *Bank of Indiana*, 476 F.Supp. at 110. These general principles of law form the basis for the holding in *East Ford*.

By arguing that the lower court founded its decision on inconspicuous print alone, East Ford ignores other evidence in the record and confuses the court's analysis of an element of procedural unconscionability - inconspicuous print - with the alleged creation of a conspicuity requirement for arbitration agreements. The lower court's opinion, and the record before it, demonstrate much more than inconspicuous print as a basis for its holding.

The Offer to Purchase or Lease Vehicle (hereinafter "Offer to Purchase") states, in pertinent part, that:

> Offeror(s) acknowledge and agree that they *have been advised and understand* that if they object to arbitration as set forth below, [East Ford] is willing to re-negotiate the terms of the offered transaction by striking or amending the Arbitration Agreement and adjusting for and/or taking into account the additional risks and costs associated with traditional judicial proceedings. *Petitioner's App. "D".*

Despite the above representation, East Ford never advised Mr. Taylor of the arbitration agreement much less discussed its willingness to re-negotiate the deal without the same. *Respondent's App. "A".* Even East Ford's salesman, who represented East Ford in the transaction, did not know the Offer to Purchase contained an arbitration agreement, probably because East Ford never gave its salesman any information or training regarding arbitration. *Respondent's App. "B".* The affidavit of East Ford's salesman confirmed that "arbitration" was never mentioned to Mr. Taylor. *East Ford*, 826 So.2d at 712-13. These facts from the record implicate the procedural unconscionability elements of lack of knowledge, lack of voluntariness, and lack of opportunity to study the contract and inquire about its terms.[1]

---

[1] The documents East Ford provided Mr. Taylor following the transaction did not include a copy of the Offer to Purchase. East Ford provided Mr. Taylor with nothing to indicate that he had signed an arbitration agreement. *Respondent's App. "A".* Even following the purchase, Mr. Taylor had no opportunity to study the arbitration agreement or inquire about its terms. Mr. Taylor was

East Ford's arbitration provisions are drawn in complex legalistic language, and Mr. Taylor had no legal knowledge or training on which to base any fair understanding of arbitration or the waiver of legal rights that the subject agreement entailed. The arbitration clause requires Mr. Taylor to waive his right to a trial and waive elements of his damages[2] while preserving for East Ford all available forums and remedies. *Petitioner's App. "D".* Even assuming that Mr. Taylor had been generally familiar with the concept of arbitration, he would have required legal counsel to fully comprehend the disadvantageous nature of the agreement.

The most prominent, and attention-commanding, portion of the Offer to Purchase appears in larger, bold type and concerns the vehicle Mr. Taylor purchased. These terms of the document, among other things, identify the vehicle and state the cash price and trade allowance. This information duplicates that found on the Bill of Sale, another document which was part of the transaction. *Respondent's App. "C".* Because it was unnecessary to duplicate terms on the Bill of

---

not aware he had signed an arbitration agreement until East Ford's counsel produced a copy of the Offer to Purchase following the filing of suit. *Respondent's App. "A".* Since he did not know about the arbitration agreement, East Ford's arguments that Mr. Taylor ignored the same by filing suit or that he should have shopped at other automobile dealerships which may not have insisted on arbitration are unavailing.

[2] Not only does the arbitration agreement exclude punitive damages, but it would also exclude damages for attorney's fees by operation of law. Absent contractual or statutory authority, attorney's fees may not be awarded in Mississippi unless punitive damages are also recovered. *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 269 (Miss. 1999).

Sale in the Offer to Purchase, this fact gives rise to the inference that the sole purpose of the Offer to Purchase was to preserve all of East Ford's legal rights while severely restricting those of Mr. Taylor. The Offer to Purchase affords East Ford an overwhelming advantage in any post-transaction dispute, evidencing a disparity in sophistication or bargaining power between the parties. The Mississippi Supreme Court correctly viewed the document as a contract of adhesion.

A quick glance at the Offer to Purchase proves the element of inconspicuous print. The printed words of the document pertaining to arbitration become difficult to discern at a distance of one to two feet from the eye while the vehicle and monetary information stands out. East Ford's contention that the document's arbitration provisions are prominently presented in relation to other terms of the document is simply erroneous.

In its references to the inconspicuous print of the Offer to Purchase, the Supreme Court of Mississippi was simply citing evidence which satisfied an element of procedural unconscionability. The court's opinion and this record reflect facts which establish other elements of procedural unconscionability. The court did not, as East Ford contends, base its decision solely on the inconspicuous print of the arbitration provisions or for that matter establish some print-size litmus test applicable only to arbitration agreements.

The Mississippi Supreme Court did not find it necessary to reach Mr. Taylor's substantive unconscionability argument, but it is apparent that the unilateral nature of the arbitration agreement and its restriction of damages played a significant role in the decision. See, *East Ford*, 826 So.2d at 714 (Commenting that the agreement only requires Mr.

Taylor to arbitrate and precludes punitive damages no matter how egregious East Ford's conduct might be). In *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Miss. 2002), the court gave further insight into the basis for its holding in *East Ford*.

In *Russell* the Mississippi Supreme Court rejected an unconscionability challenge to an arbitration agreement contained within a consumer contract. Demonstrating that its holding in *East Ford* was influenced by facts pertinent to substantive unconscionability, the court noted:

> Justice Diaz, in his dissent, argues that the arbitration agreement was unconscionable under our recent opinion in *East Ford, Inc. v. Taylor*, (citation omitted), in which we held that the arbitration provision was procedurally unconscionable. *East Ford* is easily distinguishable from the case sub judice. Most importantly, the arbitration provision allowed East Ford to pursue most of its claims against the customer in court, while the only option the customer had was to arbitrate his claims against East Ford. The arbitration provision limited the customer's remedy to actual damages only. The provision appeared less than one-third the size of many other terms in the document and appeared in very fine print and regular type font. All of the details concerning the vehicle were in boldface print while the arbitration provision was not. *Russell*, 826 So.2d at 726, n. 1.

It is important to note an absence in the record of any evidence offered by East Ford to prove that its arbitration

provisions are conscionable. To prove that a provision is conscionable, the party seeking to uphold the provision must show that it bears some reasonable relationship to the risks and needs of the business. *Bank of Indiana*, 476 F.Supp. at 109. If by some stretch of the imagination East Ford could justify such an unfair arbitration agreement, one must assume it would have attempted to offer such proof.

Even if the Mississippi Supreme Court erred in *East Ford* by relying on the ground of procedural rather than substantive unconscionability, this Court could nevertheless affirm the decision below due to the arbitration agreement's substantive unconscionability. *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224 (1937). Mr. Taylor, as Respondent, may show that the lower court's judgment is correct and should be affirmed even though it may have been based on an untenable ground. *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268, 281, 55 S.Ct. 182, 186, 79 L.Ed. 356 (1934).

III. THE MISSISSIPPI SUPREME COURT IS NOT BIASED AGAINST ARBITRATION

It is extremely difficult to accept that the Mississippi Supreme Court is hostile towards arbitration when one considers that *East Ford* is the only case in the history of Mississippi jurisprudence which invalidates an arbitration agreement on the ground of unconscionability. East Ford's reliance on *Parkerson v. Smith*, 817 So.2d 529 (Miss. 2002) as proof of this allegation is misplaced.[3]

---

[3] In *Parkerson* the Mississippi Supreme Court held that the Magnuson-Moss Warranty Act superseded the Federal Arbitration Act in regard to a breach of consumer warranties claim. East Ford implies that the Mississippi Supreme Court's refusal to follow the

Mississippi courts have time and again recognized the validity of agreements to arbitrate. In *IP Timberlands Operating Company, Ltd. v. Denmiss Corporation*, 726 So.2d 96, 103 (Miss. 1998), the Mississippi Supreme Court, recognizing that every reasonable presumption is indulged in favor of arbitration, overturned a former line of case law which allowed either party to revoke an agreement to arbitrate. Consistent with the presumption in favor of arbitration, Mississippi appellate courts have ruled that an arbitration agreement in a brokerage contract survived the death of a signatory and was binding on the signatory's heir [*Smith Barney, Inc. v. Henry*, 775 So.2d 722, 727 (Miss. 2001)]; affirmed an arbitration award, refusing to inquire into its evidentiary basis [*D'Angelo v. Hometown Concepts, Inc.*, 791 So.2d 270, 273 (Miss. Ct. App. 2001)]; and held that the presence of an arbitration clause in a 1963 contract did not render the contract illegal [*City of Starkville v. 4-County Electric Power Association*, 819 So.2d 1216, 1232 (Miss. 2002)].

In *Russell v. Performance Toyota, Inc.*, decided after *East Ford*, the Mississippi Supreme Court refused to invalidate an arbitration agreements due to alleged

---

decision of the Fifth Circuit Court of Appeals on this point of law in *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002) evidences a hostility toward arbitration. East Ford fails to mention that the Mississippi Supreme Court decided *Parkerson* on June 6, 2002 and did not have the benefit of the Fifth Circuit's decision in *Walton*, decided later on July 30, 2002. The holding in *Parkerson* was based on numerous federal cases cited therein and a 1999 regulation of the Federal Trade Commission that was consistent with the court's opinion. *Parkerson*, 817 So.2d at 532-34. *Parkerson* can hardly be interpreted to evidence a hostility towards arbitration.

unconscionability or any other ground. *Russell*, 826 So.2d 719. The fact that *East Ford* carried no precedential value in *Russell* further proves that the holding in *East Ford* is limited to its facts.

Citing cases involving dragnet clauses[4] and a forum selection clause[5], East Ford complains that the Mississippi Supreme Court did not apply any special size-of-print requirements to those type of contract provisions. None of those cited cases, however, involved claims of unconscionability or facts pertaining to the conspicuity of print.

East Ford also submits the Mississippi Supreme Court ignored an established rule of law - that misrepresentation is the sole ground on which a person may contest the terms of a contract he signed. The premise of East Ford's argument is wrong. In addition to misrepresentation, the defenses of duress and unconscionability may also be applied to invalidate a written agreement to arbitrate. *Doctor's Associates*, 517 U.S. at 687, 116 S.Ct. at 1656. Bald acceptance of East Ford's argument would leave no field of operation for the defenses of duress, unconscionability or any other ground based in law or equity for the revocation of any contract.

---

[4] East Ford's Petition cites *Iuka Guar. Bank v. Beard*, 658 So.2d 1367, 1371 (Miss. 1995); *Merchant's Nat. Bank v. Stewart*, 608 So.2d 1120, 1125-1126 (Miss. 1992); *Trapp for use and benefit of First Mississippi Bank of Commerce v. Tidwell*, 418 So.2d 786, 792-93 (Miss. 1982); and *Newton County Bank v. Jones*, 299 So.2d 215 (Miss. 1974).

[5] East Ford's Petition cites *Tel-Com Management, Inc. v. Waveland Resort Inns, Inc.*, 782 So.2d 149 (Miss. 2001).

East Ford simply lacks proof for the argument that the Mississippi Supreme Court is biased against arbitration. The lower courts in this matter, both trial and appellate, have properly applied law which is generally applicable to all contracts in invalidating East Ford's arbitration clause. Even if this Court believes that the Supreme Court of Mississippi was erroneous in its factual findings or misapplied a properly stated rule of law, such circumstance does not warrant grant of East Ford's Petition. See, U.S. Sup. Ct. R. 10.

IV. THERE ARE NO COMPELLING REASONS FOR GRANT OF THE PETITION

The issue presented in this case is not new in the national arena of arbitration. Numerous other courts have invalidated particular arbitration agreements on the ground of unconscionability. See, e.g., *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931, 935 (9th Cir. 2001); *Flores v. Transamerica Homefirst, Inc.*, 113 Cal. Rptr. 2d 376, 379 (Cal. Ct. App. 2001); *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. Ct. App. 1999); *Iwen v. U.S. West*, 977 P.2d 989 (Mont. 1999); and *Williams v. Aetna Finance Company*, 700 N.E.2d 859 (Ohio 1998).

The Supreme Court of Ohio held in 1998 that invalidation of an unconscionable arbitration clause pursuant to general contract principles did not violate the FAA. *Williams*, 700 N.E.2d at 867. In 2001, the United States Court of Appeals for the Ninth Circuit relied upon Montana's general law of unconscionability to invalidate an arbitration clause, finding that such result did not violate the FAA. *Ticknor*, 265 F.3d at 941. Importantly, this Court had the opportunity to rectify any error in *Williams* or *Ticknor* but denied Petitions for Writ of Certiorari in both cases. See, *Choice Hotels International, Inc. v. Ticknor*, 534 U.S. 1133,

122 S.Ct. 1075, 151 L.Ed.2d 977 (2002); *Aetna Finance Company v. Williams*, 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999).

Mr. Taylor does not view arbitration as a villainous procedure, *per se*. He recognizes its value as a form of alternative dispute resolution when it merely transfers his rights granted by law to a convenient and likely less expensive forum. In the instant case, however, East Ford thrust a substantively unconscionable arbitration clause upon Mr. Taylor in a procedurally unconscionable manner. He objects to arbitration here because, for lack of better words, the playing field is no longer level.

An arbitration clause which preserves unto one party all forums, remedies and damages while depriving the corollary rights of the other is antithetical to the policies underlying the FAA, an act which was passed by Congress with the needs of consumers in mind. See, *Allied-Bruce*, 513 U.S. at 280, 115 S.Ct. at 842. As cogently stated by the Supreme Court of Arkansas:

> The laudable policy behind enforcing arbitration agreements is the belief that they provide a less expensive, more expeditious means of settling litigation and relieving congested court dockets. However, they should not be used as a shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action.

Showmethemoney Check Cashers, Inc. v. Williams, 27 S.W.3d 361, 367 (Ark. 2000).

There are no compelling reasons for grant of East Ford's Petition for Writ of Certiorari. The decision of the Mississippi Supreme Court in *East Ford* does not conflict with Section 2 of the Federal Arbitration Act nor with this Court's decision in *Doctor's Associates*. The Mississippi Supreme Court merely exercised the limited power it was granted under Section 2 of the FAA -invalidation of East Ford's arbitration provision on grounds which exist in law or equity for the revocation of any contract.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM LISTON, III
LISTON/LANCASTER
304 N. CONGRESS STREET
POST OFFICE BOX 22983
JACKSON, MISSISSIPPI 39225
Tel. (601) 944-0820

Counsel of Record

E. BARRY BRIDGFORTH
HENRY, BARBOUR & DECELL, PLLC
117 E. JEFFERSON STREET
P. O. BOX 1569
YAZOO CITY, MISSISSIPPI 39194
Tel. (662) 746-2134

Counsel for Respondent

APPENDIX A

IN THE CIRCUIT COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT
STATE OF MISSISSIPPI

CIVIL ACTION NO. 251-00-278CIV

[Dated June 16, 2000]

JAMES E. TAYLOR, JR.	)
PLAINTIFF	)
versus	)
	)
EAST FORD, INC.	)
DEFENDANT	)
	)

AFFIDAVIT OF JAMES E. TAYLOR, JR.

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

PERSONALLY APPEARED before me, the undersigned authority of law for the aforesaid State and County, the within named: JAMES E. TAYLOR, JR., who after first being duly sworn, states On his oath as follows:

1. I, James E. Taylor, Jr., am the Plaintiff in the above-captioned matter and have personal knowledge of the facts and matters stated herein.

2. Prior to May 10, 1999, a personal friend named Bryan Childress, who worked as a salesman for East Ford, Inc. (hereinafter "East Ford"), invited me to visit East Ford and trade-in a 1995 Pontiac Grand Prix vehicle which I then owned on the purchase of a new truck from East Ford. I, along with my Mother, Jerrie Slack, and my Brother went to East Ford for this purpose on May 10, 1999.

3. On May 10, 1999 I was 22 years of age. I graduated from high school in 1996 and thereafter attended Delta State University for one semester and Holmes Junior College for one year. I have never had any legal training or taken any courses or classes concerning the law. I asked my Mother, Jerrie Slack; to accompany me to East Ford on May 10, 1999 because as of that date I had never purchased an automobile without her assistance.

4. During my visit to East Ford on May 10, 1999, Bryan Childress showed me what he called a "demonstrator" truck which he said had been used by one of East Ford's sales managers. During our discussions about the truck, Bryan Childress represented to me several times that the truck was a new vehicle, as opposed to a used vehicle, and represented to my Mother and me that the truck had never been titled. After agreeing on the price of the truck with East Ford, which I believed was a fair price for a new truck, I purchased the truck which was a 1998 Ford F150 pickup bearing vehicle identification number 1FTZF1725WNB79988 for the amount of $22,051.77. East Ford gave me copies of the Bill of Sale and Application for Certificate of Title dated May 10, 1999. Both of these documents reflect that the truck was a "new" vehicle and that I was receiving the "original" title on the truck.

5. I financed the purchase of the truck with the Bank

of Yazoo City, Mississippi. Pursuant to my agreement with the bank I obligated myself to pay and am paying the bank the sum of $535.35 a month for 48 months from the date of sale.

6. Subsequent to my purchase of the truck, I was pulled over for speeding in the truck by an Alabama State Trooper outside of Birmingham, Alabama. When the trooper checked the vehicle identification number of my truck, he informed me that I did not own the truck but that it was owned by someone named Samuel Goad. When I returned to Mississippi, I learned that East Ford had in fact sold the vehicle to one Samuel Goad on or about March 12, 1999, that the vehicle had previously been titled in Mr. Goad's name, that the vehicle was somehow returned to East Ford or repossessed by East Ford, and that East Ford misrepresented to me that the truck was "new" and had never been titled on May 10, 1999. Because the vehicle was used but my Application for Certificate of Title said the vehicle was "new", I was unable to obtain a certificate of title to the truck in my name.

7. I subsequently returned to East Ford to inquire into this matter further and to obtain a correct Application for Certificate of Title. Initially, East Ford's representative denied that it had sold me a new truck. However, after East Ford located copies of my Bill of Sale and Application for Certificate of Title, it provided me with a another Application for Certificate of Title and Bill of Sale which reflected that the truck as sold to me on May 10, 1999 was a "used" vehicle.

8. As a result of East Ford's misrepresentation concerning the truck, its true value on the date of sale was approximately was approximately $15,375.00, an amount $6,676.77 less than the purchase price I paid for the truck under the belief that it was a new vehicle.

9. I recently reviewed East Ford's "Offer to Purchase or Lease Vehicle", a copy of which was provided to me by my attorney in this matter. East Ford did not provide me with a copy of this document during or following my purchase of the truck on May 10, 1999. Although I have no recollection of signing this specific document, I do, however, recognize my signature on the document. I also recognize the signature of Bryan Childress on this document.

10. After a purchase price for the truck, had been agreed upon on May 10, 1999 and after my Mother had left the dealership, Bryan Childress gave me several documents which he said I needed to sign to finalize the deal and showed me where to sign on the documents. Bryan Childress did not ask me to read the documents I had to sign and did not tell me I needed to read these documents. Trusting in Bryan Childress, I did not read the documents he requested me to sign.

11. Although the Offer to Purchase or Lease Vehicle states that I was advised that if I object to arbitration that East Ford is willing to renegotiate the terms of the transaction by striking or amending the arbitration agreement, no one associated with East Ford ever told me that I was signing an arbitration agreement or agreeing to arbitration or that I could object to arbitration as provided in the Offer to Purchase or Lease Vehicle. In fact, the term "arbitration" was never mentioned to me on May 10, 1999, the date I purchased the truck. Further, since arbitration was never mentioned, no one explained to me what arbitration was or discussed with me what rights I may be giving up by agreeing to arbitration. I did not know that I had signed an arbitration agreement until my attorney sent me a copy of the Offer to Purchase or Lease Vehicle after suit was filed in this matter. If someone had mentioned the word "arbitration" to me on May 10, 1999, I

would have certainly inquired what it meant since I have no legal knowledge, and as of that date, I had no understanding as to the meaning of the term.

12. For the foregoing reasons, I never agreed nor intended to agree to arbitration when purchasing my truck from East Ford on May 10, 1999.

13. At the time I purchased the truck on May 10, 1999, I was a resident of Mississippi living in Pickens, Mississippi.

14. While at East Ford's dealership on May 10, 1999 I made two (2) telephone calls from the dealership to Bankplus in Yazoo City, Mississippi. During these calls, I spoke with Brian Jones, President of Bankplus about financing the truck which I bought from East Ford on May 10, 1999. Following my purchase of the truck, I financed its purchase with Bankplus.

15. Further, affiant sayeth not.

/s/_____
JAMES E. TAYLOR, JR.

SWORN TO AND SUBSCRIBED before me on this the 16th day of June, 2000.

/s/_____
NOTARY PUBLIC

My Commission Expires:
My Commission Expires February 26, 2002

APPENDIX B

IN THE CIRCUIT COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT
STATE OF MISSISSIPPI

CIVIL ACTION NO. 251-00-278CIV

[Dated June 21, 2000]

JAMES E. TAYLOR, JR.	)
PLAINTIFF	)
versus	)
	)
EAST FORD, INC.	)
DEFENDANT	)
	)

AFFIDAVIT OF BRYAN CHILDRESS

STATE OF MISSISSIPPI
COUNTY OF RANKIN

PERSONALLY APPEARED before me, the undersigned authority of law for the aforesaid State and County, the within named BRYAN CHILDRESS, who after first being duly sworn, states on his oath as follows:

1. I, Brian Childress, am an adult, resident citizen of the State of Mississippi and have personal knowledge of the facts and matters stated herein.

2. On May 10, 1999 I was working as a salesman for East Ford, Inc. (hereinafter "East Ford") and sold a 1998 Ford F-150 pickup truck to James E. Taylor, Jr.

3. I began working as a salesman for East Ford about two to three months prior to May 10, 1999. Before I sold the truck to James E. Taylor, Jr. on May 10, 1999 I had sold numerous vehicles for East Ford.

4. Before I sold the truck to James E. Taylor, Jr. on May 10, 1999 I was aware that East Ford had offered any salesman who sold the truck a bonus of $1,000.00. At no time did I personally have any knowledge that East Ford had sold the truck to another person before the date that I sold the truck to James E. Taylor, Jr. on behalf of East Ford.

5. In my job with East Ford I reported to Marvin Noah and Lanier Price who were sales managers employed by East Ford. Before selling the truck to James E. Taylor, Jr., both Marvin Noah and Lanier Price told me that the truck was a new vehicle and had never been titled. Mr. Brian Jones, an officer of BankPlus in Yazoo City, Mississippi, which financed the purchase of the truck, asked me about the mileage of the truck and whether the truck was new. I again spoke with Marvin Noah who explained the mileage on the truck by telling me it was a demonstrator vehicle, and Mr. Noah again told me that the truck was new and had never been titled.

6. After selling the truck to James E. Taylor, Jr., I learned that East Ford had in fact sold and titled the truck to a customer named Samuel Goad before May 10, 1999.

7. As the salesman for East Ford, I submitted to James E. Taylor, Jr. all East Ford paperwork and documents

regarding the truck. At that time I had no knowledge that an arbitration agreement was part of the transaction between East Ford and James E. Taylor, Jr. I did not discuss anything about arbitration with James E. Taylor, Jr. on May 10, 1999. The subject of arbitration was never mentioned between us.

8. Although I had sold numerous vehicles for East Ford before May 10, 1999, I never discussed arbitration with any customers to whom I sold vehicles on behalf of East Ford. In my training with East Ford I was never given any information about arbitration or any instructions to discuss arbitration with any customers of East Ford.

9. Further, affiant sayeth not.

/s/_____
BRYAN CHILDRESS

SWORN TO AND SUBSCRIBED before me on this the 21 day of June, 2000.

/s/_____
NOTARY PUBLIC

My Commission Expires:

Notary Public State of Mississippi At Large
My Commission Expires: June 19, 2002
Bonded thru Heldam, Brooks & Garland, Inc.

APPENDIX C

Bill of Sale dated May 10, 1999

See Fold Out Exhibit

LEMON'S AWARD WINNER

BILL OF SALE

EAST FORD, Inc.

3940 Hwy. 80 West-P.O. Box 10525
Telephone (601) 922-3311
JACKSON, MISSISSIPPI 39209

DATE: 05/18/1999 — INVOICE NO.: N 36979

SOLD TO: JAMES E TAYLOR JR
ADDRESS: 1859 MOLE STABE SLACK RD
PICKENS MS 39146
(601)673-9764 (601)771-5565

YEAR	MAKE	MODEL	NEW OR USED	VEHICLE IDENT. OR SERIAL NO.
1998	FORD	F150	NEW	1FTZF1725WNB79988

SALESMAN: CHILDRESS, BRYAN — KEY NOS.: 9306X

INSURANCE COVERAGE INCLUDES

FIRE & THEFT ☐ — PUBLIC LIABILITY - AMT. ☐
COLLISION - AMT. DEDUCTIBLE ☐ — PROPERTY DAMAGE - AMT. ☐

OPTIONAL EQUIPMENT AND ACCESSORIES

GROUP	DESCRIPTION	PRICE
	MILEAGE: 620	

I/WE HEREBY WARRANT THE TITLE TO SAID VEHICLE, AND THAT SAME IS FREE OF ALL LIENS AND ENCUMBRANCES.

SIGNATURE OF SELLER

EAST FORD INC.
JACKSON, MS 39209
ADDRESS OF SELLER

USED CAR TRADED

YEAR	MAKE	MODEL	VEHICLE IDENT. OR SERIAL NO.
95	PONTIAC	GRAND PRIX SD	1G2WJ52M3SF276665

BODY COLOR: MILEAGE: 100128

SRC 100 120 200 — SALESMAN NUMBER — C 8 8 6 4 — 98T101

PRICE OF CAR

	DESCRIPTION	COST	KEY	ACCT NO.	SALE	KEY
	N. CAR-LTD CR. VIC.		C	3000		-
	THUNDERBIRD		C	3010		-
	TAURUS		C	3020		-
	CONTOUR		C	3090		-
	MUSTANG		C	3040		-
	PROBE		C	3050		-
	ESCORT		C	3060		-
	ASPIRE		C	3080		-
	OTHER		C	2424		-
	NEW CAR FLEET		C	3350		-
	NEW TRUCK		C	3440		-
	NEW CAR INV. + 1300		C	1301	21524.	-
	NEW TRUCK INC. + 1310		C	1311		-
	APPLICATION FOR TITLE		C	9300		-
	STATE INSPECTION		C	9300	5.	-
	DOC FEE		C	2310	139.	-
	DOC FEE → CAR DEAL NO.					
	SALES TAX			2150	1202.82	-
	E.S.P. #			2102	478.	-
				5040		-
	TOTAL CASH PRICE					
	CREDIT LIFE INS.			5020	22851.	-
	ACCIDENT & HEALTH INS.			2701		-
	TOTAL TIME PRICE					

SETTLEMENT

DEPOSIT		1110	2285	1. -
CASH ON DELIVERY (CAR ACCOUNTS REC.)		1210		+
REBATE		1110		+
USED CAR ALLOWANCE PAYMENTS MONTHS DOLLARS PER MONTH	12000.00		1051.	NONE
			TOTAL	21000.
LIEN PAYOFF BANKPLUS		2310	2285	1. -
FINANCE CONTRACTS BANKPLUS		1020	10948.	-
		1220		+
		5000		-
				+
				-
RECONDITIONING-USED CARS		7000		+
SALESMAN #		2413		-
		2703		+
		7190		-
VALUE OF TRADE — STOCK NO. 98T101		1350		+
		1360		

RE 11

EXHIBIT 2 — 131

FORM CTM 131 OUT

BEST AVAILABLE COPY